

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

GALE E. WEST,

Plaintiff,

v.

JOSEPH LEHMAN, *et al.*,

Defendants.

Case No. C05-5239RBL

REPORT AND  
RECOMMENDATION

**NOTED FOR:  
February 24<sup>th</sup>, 2006**

This Civil Rights action has been referred to the undersigned Magistrate Judge pursuant to Title 28 U.S.C. § 636(b)(1)(B). The plaintiff has paid the filing fee and is not proceeding *in forma pauperis*. (Dkt. # 1). Before the court is plaintiff's motion to withdraw the complaint without prejudice. (Dkt. # 12). The defendants do not oppose the motion. (Dkt. # 13).

Procedural History

This action was commenced April 1<sup>st</sup>, 2005 when plaintiff paid the filing fee and the complaint was filed. (Dkt. # 1). An answer was filed August 15<sup>th</sup>, 2006. (Dkt. # 10). The court then filed a scheduling order. (Dkt. # 11). The time allotted for discovery in this action has just expired and dispositive motions are due on or before February 24<sup>th</sup>, 2006. (Dkt. # 11).

Discussion

Plaintiff's motion must be made under Fed. R. Civ. P. 41(a)(1). Such motions must be made

1 prior to the filing of an answer. Here, an answer was filed by defendant over four months before the  
2 motion to dismiss. (Dkt. # 10 and 12). The court would not normally consider this motion as the  
3 motion is untimely. Defendants have indicated they do not oppose dismissal without prejudice.  
4 (Dkt. # 13). The motion should therefore be **GRANTED**. A proposed order accompanies this  
5 Report and Recommendation.

6 Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal rules of Civil Procedure, the  
7 parties shall have ten (10) days from service of this Report to file written objections. *See also* Fed.  
8 R. Civ. P. 6. Failure to file objections will result in a waiver of those objections for purposes of  
9 appeal. Thomas v Arn, 474 U.S. 140 (1985). Accommodating the time limit imposed by Rule 72(b),  
10 the clerk is directed to set the matter for consideration on **February 24<sup>th</sup>, 2006**, as noted in the  
11 caption.

12  
13 DATED this 30<sup>th</sup> day of January, 2006.

14  
15 /s/ J. Kelley Arnold  
16 J. Kelley Arnold  
United States Magistrate Judge  
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